

the Immigration and Nationality Act (INA), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers.

(a)(2) *The Secretary's determinations.* Before any factual determination can be made concerning the availability of U.S. workers to perform particular job opportunities, two steps must be taken. First, the minimum level of wages, terms, benefits, and conditions for the particular job opportunities, below which similarly employed U.S. workers would be adversely affected, must be established. (The regulations in this part establish such minimum levels for wages, terms, benefits, and conditions of employment.) Second, the wages, terms, benefits, and conditions offered and afforded to the aliens must be compared to the established minimum levels. If it is concluded that adverse effect would result, the ultimate determination of availability within the meaning of the INA cannot be made since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels. *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th Cir. 1976).

Once a determination of no adverse effect has been made, the availability of U.S. workers can be tested only if U.S. workers are actively recruited through the offer of wages, terms, benefits, and conditions at least at the minimum level or the level offered to the aliens, whichever is higher. The regulations in this part set forth requirements for recruiting U.S. workers in accordance with this principle.

(a)(3) *Construction.* This part and its subparts shall be construed to effectuate the purpose of the INA that U.S. workers rather than aliens be employed wherever possible. *Elton Orchards, Inc. v. Brennan*, 508 F. 2d 493, 500 (1st Cir. 1974), *Flecha v. Quiros*, 567 F. 2d 1154 (1st Cir. 1977). Where temporary alien workers are admitted, the terms and conditions of their employment

must not result in a lowering of the terms and conditions of domestic workers similarly employed, *Williams v. Usery*, 531 F. 2d 305 (5th Cir. 1976); *Florida Sugar Cane League, Inc. v. Usery*, 531 F. 2d 299 (5th Cir. 1976), and the job benefits extended to any U.S. workers shall be at least those extended to the alien workers.

(b) *Subparts D and E.* Subparts D and E of this part set forth the process by which health care facilities can file attestations with the Department of Labor for the purpose of employing or otherwise using nonimmigrant registered nurses under H-1A visas.

(c) *Subparts F and G.* Subparts F and G of this part set forth the process by which employers can file attestations with the Department of Labor for the purpose of employing alien crewmembers in longshore work under D-visas and enforcement provisions relating thereto.

(d) *Subparts H and I of this part.* Subparts H and I of this part set forth the process by which employers can file with, and the requirements for obtaining approval from, the Department of Labor of labor condition applications necessary for the purpose of petitioning INS for H-1B visas for aliens to be employed in specialty occupations or as fashion models of distinguished merit and ability, and the enforcement provisions relating thereto.

(e) *Subparts J and K of this part.* Subparts J and K of this part set forth the process by which employers can file attestations with the Department of Labor for the purpose of employing nonimmigrant alien students on F-visas in off-campus employment and enforcement provisions relating thereto.

[43 FR 10312, Mar. 10, 1978, as amended at 52 FR 20507, June 1, 1987; 55 FR 50510, Dec. 6, 1990; 56 FR 24667, May 30, 1991; 56 FR 54738, Oct. 22, 1991; 56 FR 56875, Nov. 6, 1991; 57 FR 1337, Jan. 13, 1992; 57 FR 40989, Sept. 8, 1992]

#### **§ 655.00 Authority of the Regional Administrator under subparts A, B, and C.**

Pursuant to the regulations under this part, temporary labor certification determinations under subparts A, B, and C of this part are ordinarily made by the Regional Administrator of an

Employment and Training Administration region. The Director, however, may direct that certain types of applications or certain applications shall be handled by, and the determinations made by, the United States Employment Service (USES) in Washington, DC. In those cases the Regional Administrator will informally advise the employer or agent of the name of the official who will make determinations with respect to the application.

[43 FR 10313, Mar. 10, 1978, as amended at 52 FR 20507, June 1, 1987; 55 FR 50510, Dec. 6, 1990]

**Subpart A—Labor Certification Process for Temporary Employment in Occupations Other Than Agriculture, Logging, or Registered Nursing in the United States (H-2B Workers)**

**§ 655.1 Scope and purpose of subpart A.**

This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant aliens in the United States in occupations other than agriculture, logging, or registered nursing.

[55 FR 50510, Dec. 6, 1990]

**§ 655.2 Applications.**

Application forms for certification of temporary employment of nonimmigrant aliens may be obtained from and should be filed in duplicate with the local office of the State employment service serving the area of proposed employment.

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(Pub. L. No. 96-511)

[33 FR 7570, May 22, 1968, as amended at 49 FR 18295, Apr. 30, 1984. Redesignated and amended at 55 FR 50510, Dec. 6, 1990]

**§ 655.3 Determinations.**

(a) When received, applications for certification shall be forwarded by the local office of the State employment service to the appropriate Regional Administrator, Employment and Training Administration, who will issue them if

he or she finds that qualified persons in the United States are not available and that the terms of employment will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(b) In making this finding, such matter as the employer's attempts to recruit workers and the appropriateness of the wages and working conditions offered, will be considered. The policies of the United States Employment Service set forth in part 652 of this chapter and subparts B and C of this part shall be followed in making the findings.

(c) In any case in which the Regional Administrator, Employment and Training Administration, determines after examination of all the pertinent facts before him or her that certification should not be issued, he or she shall promptly so notify the employer requesting the certification. Such notification shall contain a statement of the reasons on which the refusal to issue a certification is based.

(d) The certification or notice of denial thereof is to be used by the employer to support its visa petition, filed with the District Director of the Immigration and Naturalization Service.

[33 FR 7570, May 22, 1968, as amended at 43 FR 10311, Mar. 10, 1978. Redesignated and amended at 55 FR 50510, Dec. 6, 1990]

**§ 655.4 Territory of Guam.**

Subpart A of this part does not apply to temporary employment in the Territory of Guam, and the Department of Labor does not certify to the Immigration and Naturalization Service (INS) the temporary employment of nonimmigrant aliens under H-2B visas in the Territory of Guam. Pursuant to INS regulations, that function is performed by the Governor of Guam, or the Governor's designated representative within the Territorial Government.

[56 FR 56875, Nov. 6, 1991]

**Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)**

SOURCE: 52 FR 20507, June 1, 1987, unless otherwise noted.